

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANTS:

ROBERT F. PETERS

BROOKE S. SHREVE

Lucas, Holcomb & Medrea, LLP

Merrillville, Indiana

ATTORNEY FOR APPELLEE:

DARNAIL LYLES

Gary, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LUKE OIL COMPANY, INC., an Indiana Corporation, SVT, LLC, an Indiana Limited Liability Company, and VAN TIL'S SUPERMARKET, INC, an Indiana Corporation, Individually and D/B/A ALMIRA'S,

Appellants-Plaintiffs,

VS.

LAKE COUNTY, INDIANA; THE
BOARD OF COMMISSIONERS
OF LAKE COUNTY, INDIANA; and
CHRISTINE S. CLAY, Director of the
Lake County, Indiana Department of
Weights and Measures,

Appellees-Defendants.

[illegible]

No. 45A03-0611-CV-540

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0504-PL-16

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Luke Oil Company, Inc., an Indiana corporation, SVT, LLC, an Indiana limited liability company, and Van Til's Supermarket, Inc., an Indiana corporation, individually and doing business as Almira's, (collectively, "Luke Oil") appeal the trial court's partial grant of summary judgment to Lake County, the Board of Commissioners of Lake County, and Christine S. Clay, Director of the Lake County Department of Weights and Measures (collectively, "Lake County"). The order relates to an "Ordinance Establishing the Rules and Penalties for Weights and Measures" ("Ordinance No. 1264D") passed by the Lake County Council that, in part, revised the license fee schedule for all businesses employing weights and measures in Lake County to double the license fee to \$100.00 per location and established fines if specific requirements were violated. The trial court's order declared that the ordinance is invalid as it relates to the imposition of fines,¹ but valid as to the imposition of a licensing fee. Two issues presented for our review are: (1) whether Lake County has the authority to regulate weights and measures and impose license fees, and (2) whether the license fees are an unlawful attempt to impose fees for tests and inspections of weights and measures. Concluding that the trial court properly found Lake County had the authority to

¹ The portion of Ordinance 1264D that prescribed fines is not part of this appeal.

regulate weights and measures and institute a license fee, and that the license fee is reasonable and relates to the County's administrative and regulatory costs, we affirm.

Facts and Procedural History

On February 8, 2005, the Lake County Council approved Ordinance No. 1260A entitled "Ordinance Establishing the Rules and Penalties for Weights and Measures." At the time it was enacted, Ordinance No. 1260A was an amendment of prior ordinances, that had been approved by the Lake County Council, and that established license requirements for all businesses employing weights and measures in Lake County, set license fees, and established penalties for weights and measures violations. Prior to the adoption of Ordinance No. 1260A, the license fees for all businesses employing weights and measures in Lake County was generally \$50.00 per location. Ordinance No. 1260A would have changed the license fees to a range of \$40.00 to \$250.00 per device, "and the plaintiffs, all of whom conduct business in Lake County, Indiana, would have experienced significant increases in license fees." Appellant's App. at 7.

On April 20, 2005, Luke Oil filed its Complaint for Injunction, Declaratory Judgment, and Other Relief against Lake County contesting the validity of Ordinance No. 1260A. Subsequently, Ordinance No. 1260A was rescinded.

Thereafter, the Lake County Council passed Ordinance No. 1264D, which was also entitled "Ordinance Establishing the Rules and Penalties for Weights and Measures." Ordinance No. 1264D was essentially the same as Ordinance No. 1260A except that the license fee was amended to require a payment of \$100.00 per location, "reverting to the prior practice of charging a license fee by location and not device." Appellant's App. at 7. The

ordinance also included establishment of ordinance requirements and penalties for violations.

Luke Oil filed an amended complaint to include Ordinance No. 1264D in the claims, contesting the validity of the revised ordinance. Luke Oil subsequently filed a motion for summary judgment, alleging that Ordinance 1264D should be declared invalid because Lake County has no authority to regulate weights and measures since weights and measures are already being regulated by the State through the State Board of Health. Luke Oil further requested a determination that the license fees imposed under Ordinance No. 1264D are essentially an unlawful attempt by Lake County to impose fees for tests and inspections of weights and measures. Lake County filed its cross motion for summary judgment alleging it has the authority to regulate weights and measures, including the imposition of fines and penalties and licensing fees.

The trial court found that the legislature had established a division of weights and measures, and thus, as a matter of law, weights and measures are regulated and pre-empted by the State of Indiana. Appellant's App. at 11. The court declared Lake County's attempt to impose and collect civil penalties creates an impermissible conflict between the county ordinance and state statutory and regulatory provisions regarding weights and measures, and found the fine and penalty provisions of Ordinance No. 1264D are invalid and unenforceable.

However, the trial court also found that Luke Oil could not recover its previous payment of fines and penalties assessed by Lake County.

With regard to the license fees, the trial court found Lake County had the authority to regulate weights and measures and to impose license fees. The trial court further determined that the license fees were not an unlawful attempt to impose fees for tests and inspections of

weights and measures. Rather, based on the evidentiary material designated, the court found there was no genuine issue of material fact as to whether the license fee of \$100.00 per location charged by Lake County is reasonable and relates to the County's administrative costs. Luke Oil now appeals.

Discussion and Decision

I. Summary Judgment Standard of Review

Summary judgment is appropriate only when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Upon appeal, we are bound by the same standard as the trial court and we consider only those facts designated to the trial court. Board of Comm'rs v. Town & Country Utils., 791 N.E.2d 249, 252 (Ind. Ct. App. 2003), trans. denied. We do not reweigh the evidence, but instead liberally construe the designated evidentiary material in the light most favorable to the non-moving party to determine whether there is a genuine issue of material fact. Township Bd. of Calumet Twp. of Lake County v. Elgin, 850 N.E.2d 1020, 1022 (Ind. Ct. App. 2006).

A trial court's grant of summary judgment is clothed with a presumption of validity, and the appealing party has the burden of persuading us that the trial court erred. Id. If the trial court's ruling can be sustained on any theory or basis supported by the record, we must affirm. Id. The fact that the parties filed cross-motions for summary judgment does not alter this standard. Id.

Further, questions of law are reviewed de novo. Id. at 1023. The interpretation of a statute is a question of law reserved for the courts. Id. Interpretation of an ordinance is

subject to the same rules that govern the construction of a statute. Town & Country Utils., 791 N.E.2d at 253.

II. Statutory Framework

A. The Home Rule Act

The Home Rule Act, Indiana Code chapter 36-1-3, provides, in part, that a local unit of government has all powers granted to it by statute and all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute. Ind. Code § 36-1-3-4(b). The Home Rule Act further directs that: “Any doubt as to the existence of a power of a [county] shall be resolved in favor of its existence.” Ind. Code § 31-1-3-3(b). These broad grants of power to local governments were intended to further the state’s policy of “grant[ing] [counties] all the powers that they need for the effective operation of government as to local affairs.” Ind. Code § 36-1-3-2.

However, certain powers are specifically withheld from local governmental units. A governmental unit may not exercise any power that is expressly denied by statute, or is expressly granted to another entity. Ind. Code § 36-1-3-5. The Home Rule Act withholds from local governments “[t]he power to impose a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power.” Ind. Code § 36-1-3-8(a)(5). The term “regulate” includes licensing, inspecting, or prohibiting. Ind. Code § 36-1-2-15.

B. Legislation Regarding Weights and Measures

The Indiana Legislature established the division of weights and measures (the “Division”) within the State Department of Health. Ind. Code § 16-19-7-1. The primary

statutory provisions regarding weights and measures are addressed in Indiana Code chapter 24-6-3. The Division has “general supervision of the weights, measures, and measuring and weighing devices in use in Indiana.” Ind. Code § 24-6-3-2(b). The Division is responsible for the control and custody of the standards that are used by the Division, and must “cause them to be kept in a fireproof building belonging to the state, and from which they shall not be removed except for repairs or for certification, and take all other necessary precautions for their safekeeping.” Ind. Code § 24-6-3-2(a).² Further, the Division has the authority to “adopt rules, specifications, and tolerances necessary for the enforcement of [Indiana Code chapter 24-6-3]. Ind. Code § 24-6-3-2(c). The Division is required to issue rules which shall guide state, county, and city inspectors, and govern the procedure to be followed by those persons in the discharge of their duties. Ind. Code § 24-6-3-2(f). The statutory scheme requires a county of a population of 30,000 or more to appoint a county inspector of weights and measures. Ind. Code § 24-6-3-3. The county inspectors are required to “take charge of and safely keep the county ... standards” and “shall have the power within the county ... to inspect, test, try and ascertain if they are correct, all weights, scales, beams, measures of every kind, instruments or mechanical devices for measurement and the tools, appliances or accessories, connected with any or all such instruments or measurements used or employed within the county ... by any proprietor, agent, lessee or employee in determining the size, quantity, extent or measurement of quantities, things, produce, articles for distribution or consumption offered or submitted by such person or persons for sale, for hire or award.” Ind. Code § 24-6-3-5.

² The statute specifically states that the “standards” themselves are to be so kept rather than the

Also, rules have been adopted as part of Indiana's regulation of weights and measures and include provisions regarding standards for weights and measures, and a comprehensive schedule of civil penalties for persons failing to comply with state statutes or regulations of the Division. 410 I.A.C. 12-1-1.1 et seq. The Indiana State Department of Health has been authorized to seek these penalties for violations. 410 I.A.C. 12-1-7.

While the primary authority for the regulation of weights and measures rests with the state, and Indiana Code section 24-6-3-5 does not set forth specific controls for maintaining the standards used by the county, each governmental unit is allowed to determine a system to safely keep the county standards. The Indiana Code addresses local government and the general powers concerning public safety, and specifically states that "a [governmental] unit may establish, maintain and operate a weights and measures standards control system. However, a [governmental] unit may not establish fees for inspections or tests relating to weights and measures." Ind. Code § 36-8-2-12.

III. County Regulation of Weights and Measures

A. Ordinance No. 1264D

Ordinance No. 1264D addresses various issues regarding weights and measures. Its purpose is, in part, "to protect and promote commerce within the State of Indiana, County of Lake and to protect all consumers by insuring the accuracy of commercial transactions involving weights, measures, and packages commodities." Appellant's App. at 15. To achieve this purpose, the ordinance requires that the county inspector issue a license to qualified applicants. The ordinance further provides that a license is required at any location

"devices" or "apparatus" used to measure and determine compliance with the standards.

using an instrument or engaged in the buying, selling, bartering or exchanging of goods or commodities, and that to obtain or renew a license, an applicant must pay a license fee. Payments received are placed in the Lake County Weights and Measures User Fee Fund (“User Fee Fund”) as required by the Lake County Council.

B. Authority to Regulate Weights and Measures

Luke Oil’s motion for summary judgment sought, in part, a determination that Lake County has no authority to regulate weights and measures since weights and measures are already regulated by the State through the State Board of Health, and that therefore Ordinance No 1264D is invalid and unenforceable and Lake County is not authorized to charge a license fee for businesses employing weights and measures.

The trial court found, and we agree, that weights and measures are regulated by the State of Indiana, based on the statutory provisions of Indiana Code chapter 24-6-3. A governmental unit may validly legislate in an area pre-empted by the legislature only when specific authority to do so is granted by the statute enacted. City of Hammond v. N.I.D. Corp., 435 N.E.2d 42, 48 (Ind. Ct. App. 1982). An impermissible conflict exists between an ordinance adopted by a local governmental unit and a statute enacted by the legislature when the ordinance contradicts, duplicates, alters, amends, modifies or extends the subject matter of a statute. City of Indianapolis v. Sablica, 264 Ind. 271, 342 N.E.2d 853, 845-55 (1976).

The trial court also found “Lake County may establish and operate a weights and measures standards control system,” pursuant to Indiana Code section 36-8-2-12. Appellant’s App. at 12. We must determine whether authorization to Lake County to operate a weights and measures standards control system, pursuant to Indiana Code section 36-8-2-

12, allows Lake County to regulate weights and measures and implement a license fee.

The cardinal rule of statutory construction is to ascertain the intent of the drafter by giving effect to the ordinary and plain meaning of the language used. Town & Country Utils., 791 N.E.2d at 253. In construing a statute, “it is the duty of the Court to determine and to give effect to the true intent of the legislature.” Twp. Bd. of Calumet Twp. Of Lake County, 850 N.E.2d at 1023. Further, statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. Town & Country Utils., 791 N.E.2d at 253. Interpretation of an ordinance is subject to the same rules that govern the construction of a statute. Id. Ordinances should be interpreted so as to uphold their validity whenever possible. Id.

A license is “a permit, granted by an appropriate governmental body, generally for a consideration, to a person, firm, or corporation to ... carry on some business subject to regulation.” Schloss v. City of Indianapolis, 553 N.E.2d 1204, 1207 (Ind. 1990) (quoting Black’s Law Dictionary 829 (5th ed. 1979) (citation omitted)).

A license fee is the consideration given for the receipt of the permit. It must be related to the government’s cost for regulating the occupation or business.

Indianapolis grants licenses and exacts regulation-related fees for a wide variety of business activities: it licenses the right to run massage parlors, operate taxicabs, deal in secondhand goods, and sell beverages, flowers, and foods from carts. Each type of license is granted to a number of people in anticipation of competition among them. Every person wishing to engage in a licensed business must follow certain procedures set by ordinance and pay a fee. Indiana Code § 36-1-3-8(5) applies to this type of a set fee, one assessed against numerous people in exchange for the opportunity to compete in the marketplace.

Schloss, 553 N.E.2d at 1207 (citation and footnote omitted) (Indiana Code section 36-1-3-

8(5) did not apply to the city's cable television franchise fee).

“If the state has not chosen to occupy an area to the exclusion of municipal regulation, then a city may impose additional regulations, provided the regulations are within the governmental unit's legislative authority and are not in conflict with the rights granted or reserved by the General Assembly.” Yater v. Hancock County Planning Comm'n, 614 N.E.2d 568, 575 (Ind. Ct. App. 1993), trans. denied, cert. denied, 511 U.S. 1019 (1994).

It is hornbook law municipal ordinances and regulations are inferior in status and subordinate to the laws and statutes of the state. When a state statute totally preempts the field, a city may not further legislate therein. If a city attempts to impose regulations in conflict with rights granted or reserved by the Legislature, such ordinances or regulations are invalid. However, if the State does not choose to occupy the area to the exclusion of municipal regulation, a city may impose additional, reasonable regulations which supplement the statute. However, even in cases of partial preemption, city ordinances or regulations undertaking to impose regulations which conflict with rights granted or reserved by the Legislature are invalid, at least as to those parts of a supplemental ordinance or regulation which conflict with the statute.

City of Indianapolis v. Fields, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987) (citations and footnote omitted).

Luke Oil argues Ordinance 1264D seeks to regulate the same conduct that has already been regulated by the State Department of Health and its Division of Weights and Measures. As the State has comprehensively regulated the conduct, Luke Oil argues, Lake County's Ordinance 1254D violates the Home Rule Act, Indiana Code section 36-1-3-8(a)(7). Further, Luke Oil argues, there are no statutes expressly authorizing Lake County to regulate weights and measures or impose a license fee, and thus, the adoption of Ordinance No. 1264D is contrary to law.

In opposition, Lake County asserts the enactment of the licensing provisions of Ordinance No. 1264D is within the powers granted to the Lake County Council. Lake County emphasizes that the state statute does not preempt enactment and collection of the licensing fees and does not address a license fee. Lake County states this position is statutorily consistent with the dictates of Indiana Code section 36-8-2-12, which expressly forbids only a governmental unit with a weights and measures control system from establishing fees for inspections and tests relating to weights and measures.

Lake County further states that imposition of the license fee gives Lake County notice of all locations doing business using devices subject to the state laws regarding weights and measures. Thus, the imposition of a license fee is consistent with the requirement that Lake County set up a weights and measures control system. Further, the license fee is a reasonable measure for Lake County to take to be made aware of businesses using measuring devices so that those businesses can be regulated.

Lake County is expressly authorized to regulate the operation of businesses, crafts, professions, and occupation. Ind. Code § 36-8-2-10. There is no requirement by the Division that a business must obtain a license and pay a license fee to operate within any city, county or township. Although the Division's rules are silent as to the requirement of licenses or license fees, the Division's rules provide a range of penalties for violation of the weights and measures rules. The enforcement of the State weights and measures program is delegated to the county inspector. Lake County's ability to impose a license fee to operate a business engaged in the selling of goods and commodities in Lake County is within its authority to regulate commerce within Lake County pursuant to Indiana Code section 36-8-2-

10. Thus, Lake County's regulation and license fees are not a contradiction, duplication, alteration, amendment, modification or extension of the State weights and measures program.

Indiana Code section 36-8-2-12 provides for the establishment of a weights and measures standards control system, but prohibits the imposition of fees for inspections or tests relating to weights and measures. Indiana Code section 36-8-2-12 does not restrict the County from regulating weights and measure by imposing license fees. Lake County has imposed license fees in its regulatory authority to operate weights and measures within the county. The county inspector is required and authorized to take charge of and safely keep the county standards. Thus, the Division has delegated to the county inspector the obligation and responsibility to maintain the safety and integrity of the weights and measures standards. Pursuant to that delegation of duty, Lake County has established licenses and fees to enforce the requirement of the weights and measures standards statute. Lake County has imposed the license fees as part of Lake County's regulation of businesses operating with weights and measures devices.

We conclude that the trial court did not err in granting partial summary judgment to Lake County and denying summary judgment to Luke Oil on this issue. Lake County has specific authority to regulate the operation of businesses and to establish and operate a weights and measures standards control system. Ind. Code §§ 36-8-2-10, -12. Lake County is within its authority to regulate commerce within Lake County and to require a license fee to operate a business engaged in the selling of goods and commodities in Lake County. Ordinance No. 1246D does not impermissibly contradict, duplicate, alter, amend, modify or extend the subject matter of the statute.

C. Use of License Fees

Ordinance No. 1264D imposes a license requirement on all businesses employing weights and measures in Lake County and requires each business to pay a license fee of \$100.00 per location.

Luke Oil's motion for summary judgment also sought a determination that the license fees are essentially an unlawful attempt by Lake County to impose fees for tests and inspections of weights and measures in violation of Indiana Code section 36-8-2-12. Luke Oil states that Lake County is impermissibly charging for tests and inspections relating to weights and measures by collecting the license fees and placing them into the User Fee Fund. Luke Oil complains the User Fee Fund, established by Ordinance No. 1258B, is not restricted to reimbursing the costs of issuing and maintaining the licenses or to reducing regulatory expenses connected to the licensing process, and does not designate or limit the purposes for which money in the User Fee Fund can be used. Luke Oil states a license fee can only be used to cover expenses of the activity that can lawfully be regulated pursuant to City of Portage v. Harrington, 598 N.E.2d 634, 638 (Ind. Ct. App. 1992). However, Ordinance No. 1264D and Ordinance No. 1258B allow the license fees collected to be used by the county to pay for tests and inspections or to generally subsidize operational costs, including costs related to tests and inspections. Thus, Luke Oil argues that Lake County has impermissibly raised revenue to cover its expenses involved in inspecting and testing weighing and measuring devices.

Lake County, however, states that Ordinance 1258B is not a means to collect money to pay for inspections and tests. Lake County emphasizes that the licensing fees are not

imposed for the purpose of defraying the costs of tests and inspections. Lake County agrees the costs of the license fees cannot exceed the costs of administering the County Weights and Measures Office. Lake County explains the ordinance that established the User Fee Fund was designated to receive all money collected by the Lake County Weights and Measures Department. The ordinance further specifies that any remaining money in the fund is non-reverting. Lake County points out the documents designated by Luke Oil in its Motion for Summary Judgment show Lake County has not recouped its administrative costs when the license fee was \$50.00 and will not recoup its administrative costs given the yearly estimated total license fees at \$100.00 per location. Lake County thus argues that Luke Oil has failed to demonstrate that Lake County has used the license fees or the money in the User Fee Fund for anything other than the costs of administering the Lake County Weights and Measures Department.

A license fee, authorized solely to carry out a regulatory purpose, “must be limited to the probable expense of issuing the license, inspecting and regulating the activity....A license fee which is not related to regulatory costs constitutes an impermissible revenue measure.” N. Ind. Coin Operators Ass’n. v. City of South Bend, 478 N.E.2d 704, 706 (Ind. Ct. App. 1985). A license fee that is clearly and obviously largely beyond what is needed for inspection services, clerical time, and administrative time may be declared an unconstitutional revenue tax in violation of Article 4, Section 17 of the State Constitution. Id. In N. Ind. Coin Operators, the court held that a city ordinance establishing a \$2 per washing machine, or a minimum of \$50 per establishment, licensing fee was valid because the amount was reasonably related to the administrative cost of the license. 478 N.E.2d at

706.

Another panel of this court has also looked to the stated purpose for the fee. In Harrington, 598 N.E.2d at 638, the court looked not only at whether a \$75 license fee for the use of a waterway was reasonably related to the city's costs associated with regulating the waterway, but also at the stated purpose for the fee. The city began its efforts to raise money to dredge Burn's Ditch two years before it passed an ordinance raising its license fee and legislatively earmarked the extra revenue for the specific purpose of paying for the dredging. The court held the city had the authority to impose a license fee. However, the court invalidated the amount of the license fee because the evidence revealed it was in excess of the administrative costs of exercising the regulatory power over waterways. The court stated that a license fee will not be declared a revenue tax unless it is clearly shown to be obviously and largely beyond what is needed for the regulatory services rendered. The city admitted it increased the license fee beyond the administrative costs and for the intended purpose of using the extra cash to dredge Burn's Ditch. The court held that because the city's ordinance indicated the fees were to be used to finance the cost of dredging the waterway, then by its own admission, the fee was not related to the city's regulatory activities and was contrary to law. Id.

The trial court in the instant case relied on the following language from Harrington:

In general, the cases that have dealt with the question of what is "reasonably related" under IC 36-1-3-8(5) have approached the question from the standpoint of the amount charged. When reviewing the amount charged as a license fee a court will defer to the legislative branch. The court will not generally compute the difference between administrative costs and the

amounts collected. A license fee will not be declared a revenue tax unless it is clearly shown to be obviously and largely beyond what is needed for the regulatory services rendered.

Id. at 637 (emphasis in original) (citations omitted). The trial court concluded that based on the designated evidentiary material, there is no genuine issue of material fact as to whether the license fee of \$100.00 per location charged by Lake County is reasonable and related to the County's administrative and regulatory costs.

Our review of the evidence designated for summary judgment shows that the license fees collected by the Lake County Department of Weights and Measures for the years 2001 through 2004 ranged from \$27,645.00 to \$24,438.00. Appellant's App. at 181. In 2005, the license fees collected totaled \$164,220.00. However, the operational costs associated with Lake County Weights and Measures for those same years range from \$167,977.00 to \$249,524.00. Appellant's App. at 186. Thus, the designated evidence fails to show an issue of material fact as to whether the license fees of \$100.00 per location charged by Lake County are obviously and largely beyond what is needed for the regulatory services rendered or are impermissibly used for tests and inspections. We cannot say the trial court erred in granting Lake County summary judgment on this issue.

Conclusion

The trial court properly found that Lake County has the authority to regulate weights and measures and to impose license fees. Further, the trial court did not err in finding the licensing fee of \$100.00 per location is reasonable and relates to Lake County's administrative and regulatory costs. Accordingly, we affirm.

Affirmed.

SULLIVAN, SR. J., and VAIDIK, J., concur.